SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 901

PAUL DE LUCIA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NO. ___

PAUL DE LUCIA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Paul De Lucia petitions for a writ of certiorari to review a judgment of the Court of Appeals for the Seventh Circuit filed on November 17, 1966, sustaining an order for the petitioner's deportation.

OPINION BELOW

The opinion of the Court of Appeals dated November 17, 1966, is not yet reported and is set forth in Appendix A (R. 727-732).

JURISDICTION

The judgment of the Court below, Appendix B, (R. 733) is dated and was entered on November 17, 1966. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the deportation of a sixty-nine-year-old native of Italy, a diabetic, with a single malfunctioning kidney, suffering from anemia, coronary insufficiency, and hypertension, whose physician has testified without contradiction that deportation and separation of the alien from his resident wife, citizen daughter and two citizen sons (one a mentally ill World War II veteran) would result in injury to his health and/or death — does the deportation of such an alien after forty-six years of residence in the United States constitute a denial of due process and cruel and unusual punishment contrary to the Fifth and Eighth Amendments to the Constitution?

2. Where an alien has designated England as the place of deportation pursuant to 8 U.S.C. 1253(a) and where the uncontradicted evidence establishes that he is stateless and the Board of Immigration Appeals has made no finding as to his present citizenship, may the Immigration and Naturalization Service secure England's refusal to accept him upon the basis of a false representation that he is a citizen of Italy and then proceed to make arrangements for deportation to Italy?

3. After an alien has received notice to be ready on a designated flight (on April 26, 1966) for deportation to Italy, is it premature to raise the propriety of designating Italy as a place of deportation where no evidence is presented as to a valid acceptance of the alien by Italy, (a) in a deportation proceeding, or (b) in the Court of Appeals?

4. Where prior to the deportation hearing herein the Attorney General and the Commissioner of the Immigration Service have, in published reports, referred to an alien as a "racketeer", "czar of the Chicago underworld" and "kingpin of vice" (Ex. A106, A124) and various Attorney Generals over the past ten years have stressed the desirability of giving top priority to the conviction and deportation of those in the so-called racketeer class (Ex. A111-A124), is such an alien entitled to an administrative hearing upon the claim of prejudgment raised by him before the hearing officer (known as a special inquiry officer), a subordinate of the Attorney General? Does such a claim of prejudgment require and present a prima facie case? Is it necessary to claim prejudgment, not only on the part of the hearing officer, but also on the part of the reviewing administrative body, the Board of Immigration Appeals?

5. Whether petitioner was denied a fair hearing upon his request for discretionary relief under 8 U.S.C. 1259 (registry as a permanent resident), and under 8 U.S.C. 1253(h) for a stay of deportation by reason of the denial of compulsory process to him, the denial of the right of cross examination and by reason of the prejudicial publicity created by the Attorney General.

6. Whether the refusal to consider the merits of an application to stay deportation upon medical grounds violated the regulations of the Immigration and Naturalization Service and denied due process to the petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall * * * be deprived of life, liberty, or property without due process of law * * *."

Amendment VIII of the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), 66 Stat. 212, provides in part:

> "The deportation of an alien in the United States provided for in this Act * * * shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory * * *. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon, deportation of such alien shall be directed to any country of which such alien is a subject, national or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months * * * whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without any priority or preference because of their order as herein set forth either —
>
> "(1) to the country from which such alien last entered the United States;
>
> * * *
>
> "(3) to the country in which he was born;
>
> * * *
>
> "(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory."

Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), 66 Stat. 214, as amended on October 3, 1965, 79 Stat. 918, provides:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

Section 249 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1259, 66 Stat. 219, 79 Stat. 920, provides in part:

> "A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, * * * if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under Section 212(a) insofar as it relates to criminals[1] * * * and he establishes that he —
>
> "(a) entered the United States prior to June 30, 1948;
>
> "(b) has had his residence in the United States continuously since such entry;
>
> "(c) is a person of good moral character; and
>
> "(d) is not ineligible to citizenship."

8 C.F.R. 242.8(b), 1965 Supp., provides in part:

> "The special inquiry officer assigned to conduct the hearing shall at any time withdraw if he deems himself disqualified. * * * "

8 C.F.R. 242.17(a), 1965 Supp., provides in part:

> "The respondent may apply to the special inquiry officer * * * for creation of a record of lawful admission for permanent residence under Section 249 of the Act * * * ."

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[1] The criminal ground of inadmissibility may be waived where the alien has close family ties in the United States. 8 U.S.C. 1182(h). Such waiver application was filed in the instant case.

8 C.F.R. 242.17(c), 1965 Supp., provides in part:

" * * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation * * * ."

8 C.F.R. 242.17(d), 1965 Supp., provides in part:

"An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability. The respondent shall have the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion."

8 C.F.R. 242.18(c), 1965 Supp., provides in part:

" * * * When deportation is ordered, the special inquiry officer shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed."

8 C.F.R. 243.4, 1965 Supp., provides in part:

"Any request by an alien under a final administrative order of deportation for a stay of deportation, except a request for withholding of deportation pursuant to Section 243(h) of the Act, shall be filed on Form I-246 with the district director having jurisdiction over the place where the alien is at the time of filing. The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate. * * * "

STATEMENT OF THE CASE

Petitioner is a sixty-nine-year-old native of Italy who is presently stateless. He was born in 1897, came to this country in 1920 and has had over forty-six years' of residence here. He is married to a legal resident of the United States and has three citizen children, one of whom is a mentally ill World War II veteran. Petitioner is a diabetic, with only one malfunctioning kidney. He suffers from anemia, coronary insufficiency and hypertension. He has alleged and uncontradicted medical testimony supports his claim (R. 372 et seq.) that his deportation would endanger his health and life. He has challenged the deportation order herein, administratively (R. 78 et seq.) and in the Court below (App. C) upon the ground that he has been ordered deported after a hearing lacking in due process and fairness, that he has been improperly and illegally directed to report for deportation to Italy, that his proposed deportation would violate constitutional prohibitions and that it would endanger his life and health.

Petitioner was naturalized as a United States citizen in 1928. In 1957 he was denaturalized. *United States v. De Lucia*, 256 F.2d 487 (7th Cir., 1958), cert. denied 358 U.S. 836. Thereafter, in 1959, he was ordered deported as an alien who had entered the United States without proper documents and as one who had committed a crime involving moral turpitude prior to entry. *De Lucia v. Flagg*, 297 F.2d 58 (7th Cir., 1961), cert. denied 369 U.S. 837.

Thereafter, by order of the Board of Immigration Appeals dated September 18, 1964, the deportation hearing of the petitioner was reopened and further hearings conducted culminating in a decision of the Board of Immigration Appeals on April 21, 1966, (R. 1-25) affirming an order of October 25, 1965, by a special inquiry officer (R. 141-197), to deport petitioner to England or upon England's refusal, to deport petitioner to Italy.

During the course of the 1964-1965 deportation hearing before the special inquiry officer, a subordinate of the Attorney General, petitioner moved to disqualify such officer upon a claim of prejudgment. In annual reports published by the Department of Justice in 1957, 1959 and 1962 and in a letter to Senator Eastland in 1960, the Attorney General and the Commissioner of the Immigration Service had publicly described petitioner as a "racketeer", "czar of the Chicago underworld" and "kingpin of vice" (Ex. A106, A124) and various Attorney Generals over the years have stressed the desirability of convicting and deporting such so-called racketeers. (Ex. A111-A124). Petitioner's claim of prejudgment was denied and he was refused an administrative hearing on such issue.

At the deportation hearing petitioner sought to establish the basis for his proposed acceptance by Italy as a deportee and the treatment he would be accorded upon return to Italy (Ex. A60-4 and 5). These motions were denied as not properly brought up in this proceeding (R. 358). Requests to subpoena representatives of the Federal Bureau of Investigation, Narcotics Bureau, Internal Revenue Service, Chicago Police and Public Health Service were initially denied as premature (R. 359-361) and later upon the ground that no essential testimony could be obtained from these witnesses (R. 578). Request for production of the Public Health Surgeon who examined petitioner was likewise denied (Ex. 60-12).

The Trial Attorney subsequently produced an Internal Revenue Agent and the materiality of his testimony showing that petitioner's tax returns had been audited and that no basis had been found for correction is obvious (R. 682, et seq.). The relevancy of testimony by Chicago police officers was likewise admitted by the Trial Attorney who declined to produce them for cross examination (Ex. A-100, Letter of May 27, 1965).

Ex. A134, a communication from the Italian Foreign Ministry, disclaiming discrimination or persecution of

deportees, was introduced herein on the last day of the hearing without affording petitioner the full text of the exchange of correspondence, the right to cross examine or an opportunity to rebut (R. 716-723).

Requests made in the deportation proceedings for the discretionary grant of permanent residence under 8 U.S.C. 1259 and the withholding of deportation upon a claim of physical persecution under 8 U.S.C. 1253(h) were denied.

After the Board's decision affirming the order of deportation and on the same date as the Board's order of April 21, 1966, the District Director of the Immigration Service represented to officials of the United Kingdom, that the petitioner was a citizen of Italy and upon the basis of this false statement, obtained that Government's refusal to accept him as a deportee (App. D., R. 769). Petitioner asserts and it is undisputed on this record that he is presently stateless. He lost his Italian nationality when he was naturalized as an American citizen in 1928. He did not regain such Italian nationality upon his denaturalization (Ex. A102, Attachment 2; Ex. 104 p. 26).

On April 21, 1966, as soon as England's refusal had been obtained the District Director prepared and thereafter served a notice advising petitioner that he was to be deported to Italy on April 26, 1966, on TWA Flight 770 (App. E, R. 768). Petitioner asserts that the direction to deport him to Italy is not supported by adequate findings or evidence that Italy has agreed to accept him (App. C, par. 10). Significantly, on April 27, 1966, the Italian Government revoked travel permission for petitioner and there is presently no authorization for his acceptance by Italy. An application for a stay of deportation upon medical grounds filed on May 4, 1966 (App. F., R. 741-2) was denied upon the ground that current medical information (later supplied on June 8, 1966, R. 737-9) had not been furnished (R. 740).

Petitioner filed a petition to review his deportation order in the Circuit Court of Appeals for the Seventh

Circuit on April 22, 1966, and on November 17, 1966, that Court affirmed the deportation order herein (App. A). The Court rejected the claim that deportation here offends due process or the Eighth Amendment. The claim that deportation was improperly directed to Italy by reason of a refusal obtained from England by misrepresentation was ignored. The assertion that deportation to Italy requires a prior acceptance by that country was found to be premature. It was determined that the claim of prejudgment could not be recognized because it did not present a prima facie case and also because of failure to assert prejudgment against the members of the reviewing Board of Immigration Appeals. Despite the denial of the right to compulsory process and the right to cross examine, the Court below ruled that petitioner had "received a fair opportunity to present his case and has shown no abuse of discretion". The request for a stay of deportation (App. F) denied upon procedural grounds and not on the merits was found to be properly and "fully considered".

REASONS FOR GRANTING THE WRIT

1. The exact limits of the constitutional prohibition against cruel and unusual punishment have not been detailed by this Court. *Trop v. Dulles*, 356 U.S. 86, 99-101 (1957). This petition seeks to have the Court determine for the first time the application of the Eighth Amendment to the deportation of a long time resident of the United States who is in declining health, of advanced age and with close family ties in the United States.

Wolf v. Boyd, 287 F.2d 520 (9th Cir., 1961), acknowledges that a substantial claim may be raised that deportation under circumstances presented here offends the Eighth Amendment. The Court below, however, dismisses the claim in a single sentence, as "without merit", relying upon U.S. ex rel. *Circella v. Sahli*, 216 F.2d 33, 40 (7th Cir., 1954). Whether the deportation of a sixty-nine-

year-old seriously ill stateless alien with forty-six years residence in the United States (twenty-nine as a citizen of the United States) and with close family ties offends the prohibition of the Eighth Amendment against cruel and unusual punishment is a substantial issue, not previously decided by this Court and one which merits its consideration. Exile or banishment has always been considered a form of punishment, from the days of Homer. (Exile, Encyclopedia Britannica). Deportation can be the equivalent of banishment or exile. *Delgadillo v. Carmichael*, 332 U.S. 388 (1947); *Jordan v. De George*, 341 U.S. 223 (1951). Deportation, like expatriation, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163 (1962), may be punishment, and may offend the cruel and unusual punishment prohibition of our Constitution, *Trop v. Dulles*, *supra*. If the Constitution deals with substance and not shadows as was recognized in *Cummings v. Missouri*, 4 Wall 329 (1867), then realistically and consistently with "the evolving standards that mark the progress of a maturing society", *Trop v. Dulles*, *supra*, at 101, the order of exile herein should be evaluated by this Court under the Eighth Amendment.

2. The decision below ignores the mandate of the immigration laws granting an alien the right to select and designate a place of deportation pursuant to 8 U.S.C. 1253(a). Before deportation may be effectuated to another country not designated by the alien, his country of designation must decline to accept him or fail to advise the Attorney General of acceptance within three months. Failure of the Attorney General to supply the country designated by the alien with true, full or complete information deprives him of his rights under the statute and vitiates the subsequent designation by the Attorney General of a place of deportation. U.S. ex rel. *Scala Di Felice v. Shaughnessy*, 114 F. Supp. 791 (S.D.N.Y., 1953). Here, the Immigration Service deliberately misrepresented to England that petitioner was a citizen of Italy, although the Board of Immigration Appeals and the spe-

cial inquiry officer had refused to make any finding as to citizenship (R. 2, 142). Moreover, the record clearly established that petitioner had lost his Italian citizenship in 1928 when he became a naturalized American (Ex. A-102, Attachment 2; Ex. A.104 p. 26) and that he had not regained it upon denaturalization in 1957.[2] The misrepresentation to England precluded deportation to Italy. If there is to be any integrity in the administration of the immigration laws by officials in the Department of Justice, the procedures followed herein should not be allowed to go unnoticed.

3. Although petitioner was scheduled to be deported to Italy on April 26, 1966 (App. E), the Court below found it premature to contest deportability to Italy in the absence of a valid acceptance by that country (App. A). Next to deportability determination of the place of deportation is one of the most important issues in a deportation proceeding. A valid acceptance by a receiving country is a condition precedent to deportation to that country. U.S. ex rel. *Man v. Murff*, 264 F.2d 926 (2d Cir., 1959); *Lu v. Rogers*, 164 F. Supp. 320 (D.C., Dist. of Col. 1958), aff'd. 262 F.2d 471 (D.C. Cir., 1959). Determination of the place of deportation is a matter of administrative adjudication and not an enforcement function as decided below. *Chang v. Immigration and Naturalization Service*, 358 F.2d 699 (3d Cir., 1966). The Solicitor General so advised this Court in *Cheung Lung v. Esperdy*, 382 U.S. 891 (No. 430, Oct. Term, 1965). The decision below is in conflict with the Third Circuit and the views expressed by the Solicitor General on an important and recurring issue presented in deportation proceedings.

4. The instant case alleged and established a case of prejudgment by the Attorney General and the Commissioner of the Immigration and Naturalization Service far

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[2] Under Italian law petitioner could regain Italian nationality by two years residence in Italy. Article 9(3), Italian Nationality Act of June 13, 1912, United Nations Legislative Series, Laws Concerning Nationality (1954), p. 269.

stronger and of greater substance than that presented or asserted in U.S. ex rel. *Accardi v. Shaughnessy*, 347 U.S. 260 (1953); 349 U.S. 280 (1955). A similar presentation in *Bufalino v. Kennedy*, 322 F.2d 1016 (D.C. Cir., 1963), resulted in a ruling that a prejudgment hearing was required. The ruling below is in conflict with these cases and should be reviewed.[3]

5. In his deportation proceeding, the petitioner was denied compulsory process, the right of confrontation, and the right to cross examine. Nevertheless, the Court below found that the petitioner "received a fair opportunity to present his case" (App. A). Although the petitioner was seeking discretionary relief, he was making such application in a deportation hearing which is required to conform to due process. *Sung v. McGrath*, 339 U.S. 33 (1949). Even with an application for discretionary relief, the alien should be accorded "appropriate procedural due process or fair consideration", U.S. ex rel. *Moon v. Shaughnessy*, 218 F.2d 316, 318 (2d Cir., 1954); U.S. ex rel. *Cantisanti v. Holton*, 248 F.2d 737 (7th Cir., 1957); U.S. ex rel. *Paschalidis v. District Director*, 134 F. Supp. 310 (S.D.N.Y., 1956). Regulations (8 C.F.R. 242.17, 1965 Supp.) having the force and effect of law, U.S. ex rel. *Accardi v. Shaughnessy*, 347 U.S. 260 (1953), authorize applications for discretionary relief in the deportation hearing. They require a fair opportunity to the alien to present evidence and to meet adverse in-

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[3] The ruling below that a prejudgment claim can only be maintained where prejudgment is asserted against the appellate reviewing Board of Immigration Appeals as well as against the hearing officer is without foundation or precedent. No regulations permit disqualification of the Board. Regulations authorize disqualification of the hearing officer, 8 C.F.R. 242.18(c), 1965 Supp. Evidence is adduced before the hearing officer. No evidentiary hearing is accorded before the Board which sits in a purely appellate capacity, 8 C.F.R. 3.1, 1965 Supp. A prejudgment claim against a trial judge does not necessitate a similar charge against a reviewing court to he effective.

formation. Denying an alien the subpoena power and the right to cross examine are inconsistent with the due process concept of a deportation hearing, with the provisions of the regulations and with the judicial concept that the alien be accorded a fair opportunity to present his case. The ruling below should not be permitted to stand.

6. An application for a stay of deportation upon medical grounds was filed herein on May 4, 1966 (App. F). It did not have attached to it a current medical statement. None was required by regulations as it is the administrative practice to refer the alien to a Public Health Surgeon. Contrary to this practice and despite the fact that petitioner had produced medical testimony in his deportation hearing (R. 372 et seq.), the District Director denied the application, not on its merits, but for failure to submit supporting medical data. This was later supplied on June 8, 1966. The Immigration Service has nevertheless refused to consider the stay application upon its merits. On this state of the record the Court below ruled that the application was "fully considered". We submit that in a case involving such serious consequences as this one, this is neither full nor fair consideration nor proper treatment.

CONCLUSION

Certiorari should be granted and the judgment below should be reviewed.

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15661 September Term and Session, 1966

PAUL DE LUCIA,
Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service under Public Law 87-301.

November 17, 1966

Before Hastings, *Chief Judge,* Knoch, and Swygert, *Circuit Judges.*

Swygert, *Circuit Judge.* The petitioner, Paul De Lucia[1] seeks review of an order of the Board of Immigration Appeals denying discretionary relief under sections 249, 212(h), and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1259, 1182(h), and 1253(h). The Board affirmed the decision of a special inquiry officer before whom the petitioner had been afforded an opportunity to establish his eligibility for the relief requested.

The petitioner's status as a deportable alien was established in an earlier proceeding and is not before us. *De Lucia v. Flagg,* 297 F.2d 58 (7th Cir. 1961), *cert. denied,* 369 U.S. 837 (1962). There we affirmed an order for the petitioner's deportation on the ground that he had

[1]The petitioner has also been variously known as Paul Salvi, Paul Ricca, Felice De Lucia, and Paolo Maglio.

entered this country in 1920 without a valid passport showing his identity and had committed a crime of moral turpitude (voluntary homicide) in Italy prior to his entry. The deportation proceeding was subsequently reopened upon motion by the petitioner in September 1964 for the limited purpose of presenting the petitioner's application for discretionary relief to a special inquiry officer and having that officer designate the country to which deportation was to be effected.

The first form of discretionary relief sought by the petitioner was the creation of a record of his lawful entry pursuant to section 249 of the act. Section 249 provides that a record of lawful admission for permanent residence of certain aliens may be made where no such record would otherwise exist if the alien satisfies certain requirements. Among the conditions which the alien must demonstrate to become eligible for the exercise of administrative discretion are that he entered this country prior to June 30, 1948, that he has resided here continuously since his entry, that he is "not ineligible" to citizenship, and that he is a person of good moral character.[2] The special inquiry officer found that the petitioner satisfied the first three requirements, but held that the petitioner failed to establish his eligibility for relief under section 249 because he did not show that he was a person of good moral character.[3] The special in-

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[2] In addition, the alien must show that he is "not inadmissible" under section 212(a) of the act insofar as it relates to the excludability of criminals. The criminal ground of inadmissibility may be waived by the agency under section 212(h) of the act, however, which, if done, removes what would otherwise be an existing bar to relief under section 249.

[3] The special inquiry officer based his finding with respect to the petitioner's moral character upon the lack of evidence presented by the petitioner, his incarceration for some twenty months during the preceding ifve-year period, his admitted gambling activities during 1962, and the special inquiry officer's conclusion that the petitioner had not testified truthfully at the hearing.

quiry officer also denied the relief requested as a matter of administrative discretion on the ground that the petitioner had not made a full disclosure of matters within his knowledge relevant to the exercise of such discretion. The Board denied the claim for registry under section 249 solely as a matter of administrative discretion for the same reason.

The Board's refusal to grant the relief requested was clearly warranted by the record. The petitioner refused to answer numerous questions relating to his criminal record both in Italy and the United States, the nature and source of his income, and many of his other activities. The petitioner's conduct amounted to a blatant refusal to furnish information pertinent to the exercise of administrative discretion and justified the withholding of relief.

In this review the petitioner does not attempt to advance the merits of his claim for registry under section 249, but instead contends that the hearing afforded him by the special inquiry officer was unfair and lacking in due process for various reasons. He asserts that he was prejudged by the special inquiry officer, prejudiced by adverse publicity, denied the rights of compulsory process and cross-examination, and prejudiced by an unlimited opportunity to cross-examine and other special courtesies extended to the Government. We find no merit in any of these contentions and will dispose of them in summary fashion.

To support his claim of prejudgment, the petitioner contends that certain statements by United States Attorneys General and other Department of Justice officials over a period of several years characterizing him as a "racketeer" and a "kingpin of vice" committed the special inquiry officer to action unfavorable to him. No evidence was introduced to connect any statements or supposed views of these officials with the special inquiry officer. No showing that the special inquiry officer's decision was controlled by his superiors was made. In

fact, an existing order of the Attorney General expressly directs all persons exercising hearing powers in deportation proceedings to exercise independent judgment in such matters, "uninfluenced by extraneous statements by persons official or unofficial." The petitioner contends, citing *Bufalino v. Kennedy*, 322 F.2d 1016 (D.C. Cir. 1963), that he was improperly denied a hearing to establish prejudgment when the issue was first raised in argument before the Board. In our view, the petitioner's meager presentation did not make a prima facie case of prejudgment and no such administrative hearing was required. *Marcello v. Bonds*, 349 U.S. 302 (1955). Further, the petitioner did not assert a claim of prejudgment against the Board, which is not bound by the special inquiry officer's order and may determine the case de novo.

The petitioner's contention that he was prejudiced by "intense publicity" which allegedly emanated from the Department of Justice and surrounded the hearing is unpersuasive. The record shows that the petitioner did not request a closed hearing, that he introduced no evidence to support his charge that the Department of Justice created unfavorable publicity, and that the special inquiry officer specifically stated he would not consider newspaper accounts in reaching his decision.

The petitioner complains that his requests to the special inquiry officer for the issuance of subpoenas were rejected, while similar requests by the Government were granted. The issuance of subpoenas is governed by regulation[4] and is within the discretion of the special inquiry officer. The petitioner did not comply with the regulation, and has failed to show either favoritism to the Government in the issuance of subpoenas or an abuse of discretion in denying such discovery to him.

Finally, the granting, denial, and limitation of the cross-examination of witnesses in a hearing on an appli-

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[4] 8 C.F.R. § 287.4(a)(2).

cation for discretionary relief is also a matter within the broad discretion of the special inquiry officer. The petitioner received a fair opportunity to present his case and has shown no abuse of discretion. *Wang v. Pilliod*, 285 F.2d 517 (7th Cir. 1960).

The petitioner requested a second form of discretionary relief at the hearing. He applied for the withholding of deportation to Italy pursuant to section 243(h) of the act, 8 U.S.C. § 1253(h), which relief was also denied. The hearing was conducted prior to the effective date of the amendment to section 243(h), which removed the words "physical persecution" to provide that the Attorney General may temporarily withhold deportation to any country in which the alien would be subject to "persecution on account of race, religion, or political opinion." Public Law 89-236 (October 3, 1965).[5] The petitioner contends that the hearing should be reopened to give him an opportunity to present evidence under the amended version of the statute. This contention, also presented to and rejected by the Board, is without merit.[6] The petitioner had ample opportunity to pursue a claim that he might be persecuted for political reasons, but he did not do so. The record contains evidence indicating that he would have been unsuccessful in any such attempt. Even in this review, the petitioner suggests nothing which might relate to his burden in a reopened hearing. Under the circumstances, the contention must be considered frivolous.

At the hearing before the special inquiry officer, the petitioner designated England as the country to which he wished to be deported should deportation be ordered. He

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[5] The special inquiry officer nevertheless considered the amendment in his decision.

[6] The Board applied the amended version of the statute in reaching its decision, in accordance with sellted law. Patsis v. INS, 337 F.2d 733, 737-38 (8th Cir. 1964), cert. denied, 380 U.S. 952 (1965).

was informed that if England refused to accept him or failed to inform the Attorney General of its willingness to accept him within three months after original inquiry, he would be deported to Italy. The order entered by the special inquiry officer so provides. The petitioner contends that the order is illegal because the record contains no evidence that Italy is presently willing to accept him or that England has refused to accept him. But we are here concerned only with the validity of the deportation order and not with its execution. The cases cited by the petitioner are distinguishable for that reason. *E.g., United States ex rel. Man v. Murff*, 264 F.2d 926 (2d Cir. 1959); *Lu v. Rogers*, 164 F. Supp. 320 (D.D.C.), *aff'd*, 262 F.2d 471 (D.C. Cir. 1958). We think that the order of deportation is in all respects proper and in conformity with section 243(a) of the act, 8 U.S.C. § 1253(a), and the regulations issued thereunder.

The petitioner contends that he was not given an adequate opportunity to present evidence relating to his request to stay deportation on medical grounds. The record shows that the petitioner was given a fair opportunity to introduce relevant medical information and that the evidence introduced as to his physical condition and the possible emotional impact of deportation upon the petitioner and his family was fully considered.

Finally, the petitioner's contention that his deportation will result in a cruel and unusual punishment prohibited by the eighth amendment is without merit. *United States ex rel. Circella v. Sahli*, 216 F.2d 33, 40 (7th Cir. 1954), *cert. denied*, 348 U.S. 964 (1955).

The Board's order is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Thursday, November 17, 1966

Before

Hon. JOHN S. HASTINGS, Chief Judge

Hon. WIN G. KNOCH, Circuit Judge

Hon. LUTHER M. SWYGERT, Circuit Judge

PAUL DeLUCIA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 15661

Petition for Review of an order of the Immigration and Naturalization Service.

This cause came on to be heard on the petition for review of an order of the Immigration and Naturalization Service and the record from the Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order entered by the Immigration and Naturalization Service in this cause be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

[Filed April 22, 1966]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(TITLE OMITTED)

* * *

PETITION TO REVIEW
DEPORTATION ORDER

1. This is a petition for review of a deportation order pursuant to 8 U.S.C. 1105(a) (Public Law 87-301, 75 Stat. 651).

2. Petitioner was born in Italy in 1897, came to the United States in 1920 and has resided here ever since.

3. In 1928 petitioner was naturalized as an American citizen and thereafter denaturalized in 1957. He is presently stateless.

4. On January 26, 1959, after hearings before a Special Inquiry Officer, an order of deportation was entered against petitioner upon the grounds that he entered the United States without proper documents in 1920 and had committed a crime involving moral turpitude prior to entry. The aforesaid order of deportation was affirmed on appeal by the Board of Immigration Appeals on August 25, 1959.

5. By order of the Board of Immigration Appeals dated September 18, 1964, the deportation hearing of petitioner was reopened and further deportation proceedings were conducted in 1964 and 1965.

6. In the reopened deportation proceeding, petitioner applied for permanent residence by filing a registry application. He also requested a stay of deportation upon grounds of physical persecution.

7. The reopened deportation proceedings resulted in a final order denying petitioner any form of discretionary relief and directing petitioner's deportation in the first instance to England and in the alternative to Italy.

8. The reopened deportation proceedings were conducted in an unfair manner and in violation of due process. The petitioner's motion to disqualify the Special Inquiry Officer should have been the subject of a hearing and should have been granted upon the ground of prejudgment.

9. The reopened deportation proceedings were rendered unfair by reason of unfavorable and prejudicial publicity initiated by the Department of Justice, by reason of prejudgment, by reason of the denial of compulsory process, denial of the right to cross examine and by favoritism extended to Government counsel.

10. The direction to deport petitioner to Italy was not supported by adequate findings as to the basis therefor or evidence that Italy has agreed to accept petitioner.

11. Petitioner is presently stateless, having lost his Italian nationality when he was naturalized as an American citizen in 1928. He did not regain such Italian nationality upon his denaturalization.

12. The respondent has sought and is seeking to deport petitioner to Italy upon the false representation that he is a citizen of Italy. Such actions upon the part of respondent are contrary to law.

13. Petitioner asserts that by reason of his background and the public statements and actions in the United States of various Government officials and the attitude of the Italian Government, he will be subject to persecution if he is deported to Italy.

14. Petitioner is married to a resident of the United States, is the father of three American born children, two of whom are World War veterans, and is the grand-

parent of four American born children. One of petitioner's sons is permanently disabled and requires constant medical attention. Petitioner's wife is likewise ill and under medical care.

15. Since 1941 petitioner has been afflicted with diabetes and a heart condition; that in 1942 he was injured when an elevator crashed to the basement of a building on South Wabash Avenue, where his hip, leg and foot were fractured; that he had one kidney removed in 1948; that as a result he must have constant medical care; that without such medical care petitioner's life would be seriously endangered.

16. The deportation of petitioner to Italy and the emotional strain accompanying such deportation and separation from his family will endanger his health and life.

17. The deportation of petitioner, a stateless alien, to Italy, considering his age and health, his family ties in the United States, and the length of his residence here, will violate due process of law and the constitutional prohibitions against cruel and unusual punishment.

18. The deportation order herein is void because the deportation laws are not applicable to a person who was a naturalized citizen.

19. From January 26, 1959, until the present time, petitioner has been at large on bail or supervised parole. Petitioner's liberty is being restricted by reason of the immigration restrictions imposed upon him.

20. Petitioner has exhausted his administrative remedies and no further administrative relief is available to him.

21. Criminal proceedings are not pending against petitioner for violation of 8 U.S.C. 1252(d) or (e).

22. No application for the relief requested herein has been made previously to this Court. The validity of the prior deportation order herein has been sustained in prior

litigation in this district, but the present deportation order and the present denials for administrative relief herein have not been the subject of judicial review.

WHEREFORE, Petitioner respectfully prays for an order:

(a) Declaring that the deportation hearing accorded petitioner was unfair and lacking in due process by reason of prejudgment, prejudicial publicity, denial of compulsory process, and favoritism extended to the Government.

(b) Declaring that the deportation order entered against him is null and void, contrary to law, and contrary to constitutional prohibitions in the Eighth Amendment to the Constitution.

(c) Declaring that the designation of Italy as petitioner's place of deportation is null and void and illegal.

(d) Declaring that it is improper for respondent to deport petitioner to Italy before securing a valid acceptance from such country based upon a full and true disclosure of all the facts.

(e) Declaring that the petitioner be accorded a fair and impartial hearing.

(f) Restraining respondent from apprehending, detaining or deporting petitioner.

(g) For such other and further relief as may be appropriate.

/s/ JACK WASSERMAN
/s/ DAVID CARLINER
/s/ JOSEPH I. BULGER

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
219 South Dearborn Street
Chicago, Illinois 60604

FILE: A11 129289
DATE: April 21, 1966

The person named below has been ordered deported from the United States in accordance with Section 243 of the Immigration and Nationality Act. Any person ordered deported from the United States may designate the country to which he may be sent provided such country is willing to accept him. This person has designated the country to which he wishes to be deported as England.

Name of deportee
DE LUCIA, Paul Aka SALVI, Paul Aka RICCA, Paul Aka MAGLIO, Parole
Date of birth — Place of birth
11/14/97 — Naples, Italy
Present nationality — Occupation
Italian — Retired
Residence in U.S.
1515 Bonnie Brae, River Forest, Illinois
Grounds for deportation
Excludable at time of entry into the United States. (Voluntary Homicide)
Prior residence in - None
Relatives or Friends in - None
Name and address of closest relative
Wife - Nancy DE LUCIA
Criminal Record
Convicted of voluntary homicide in Italy

Please return the duplicate of this letter, marked to show your decision concerning whether the person named will

or will not be accepted in the above-named country. The enclosed self-addressed envelope, requiring no postage, may be used for your reply. Your cooperation in this matter is greatly appreciated.

/s/ L. W. Hurney
District Director

For use of Consul

This case has been considered and it has been determined that the person named above ___ will X will not be permitted to enter United Kingdom (Name of Country) as a deportee from the United States.

/s/ F. H. Man
Vice Consul of
United Kingdom

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
219 South Dearborn Street
Chicago, Illinois 60604

File No. A11 129 289
Date: April 21, 1966

Mr. Paul DeLucia
1515 Bonnie Brae
River Forest, Illinois

As you know, following a hearing in your case you were found deportable and the hearing officer has entered an order of deportation. A review of your file indicates there is no administrative relief which may be extended to you, and it is now incumbent upon this Service to enforce your departure from the United States.

Arrangements have been made for your departure to Italy on April 26, 1966 from Chicago, Illinois on the Trans-World Airlines Flight #770.

You should report to a United States Immigration Officer at Room 334, 219 South Dearborn Street, Chicago, Ill. at 1:00 p.m. April 26, 1966, completely ready for deportation. At the time of your departure from Chicago, Illinois you will be limited to 44 pounds of baggage. Should you have personal effects in excess of this amount you must immediately contact A. C. McNeill at 828 7310, or call in person at the address noted above, and appropriate disposition of your excess baggage will be discussed with you.

Very truly yours,

/s/ L. W. HURNEY
District Director

cc: Joseph I. Bulger, Esquire
188 W. Randolph
Chicago, Illinois
Jack Wasserman, Esquire
902 Warner Bldg.
Washington, D. C.

APPENDIX F

APPLICATION FOR STAY OF DEPORTATION
United States Department of Justice
Immigration and Naturalization Service

File No. A11 129 289
Date: April 29, 1966

1. My name is Paul De Lucia.

2. My present address is 1515 Bonnie Brae, River Forest, Illinois.

3. I am a citizen or subject of Stateless, and hold a passport valid until _____.

4. My deportation has been directed to Italy, and I request a stay of deportation until indefinitely because of ill health. As the medical testimony of Dr. Champagne reveals (hearing of November 18, 1964, pages 49, et seq. I am suffering from the following: (a) diabetes; (b) coronary insufficiency; (c) high blood pressure and hypertension; (d) I have one kidney and my remaining kidney is disturbed or deteriorated; (e) enlargement of prostate gland; (f) low grade anemia (carotanemia). My deportation from the United States at this time from a psychological, emotional and medical point of view would endanger my health and my life.

I certify that all the statements I have made in this application are true and correct to the best of my knowledge and belief.

Dated at Chicago, Illinois, this 4th day of May, 1966.

/s/ PAUL DE LUCIA

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 901

PAUL DE LUCIA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 15–20) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1966 (Pet. 21). The petition for a writ of certiorari was filed on December 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is cruel and unusual punishment to deport an alien who, at the time he entered the United

States in 1920, under false documents and identity, was a convicted killer fleeing from Italy to escape prosecution for a second homicide; who had never been lawfully admitted to the United States; and whom the United States Public Health Service has found physically fit for deportation.

2. Whether there was any procedural infirmity in the consideration of petitioner's applications for discretionary relief.

3. Whether the designation of Italy as the place of petitioner's deportation was improper.

STATUTES AND REGULATIONS INVOLVED

The applicable statues and regulations are set forth in the petition for certiorari. We deem it appropriate, however, to set forth 8 C.F.R. § 242.17(c) in its entirety:

> (c) *Temporary withholding of deportation.* The special inquiry officer shall notify the respondent that if he is finally ordered deported his deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by him and shall afford the respondent an opportunity then and there to make such designation. The special inquiry officer shall then specify and state for the record the country, or countries in the alternate, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or the respondent declines to designate a country. The respondent shall be advised that pursuant to section 243(h) of

the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, or political opinion as claimed. The determination under section 243(h) of the Act may be based upon information not of record if, in the opinion of the special inquiry officer or the Board, the disclosure of such information would be prejudicial to the interests of the United States.

STATEMENT

Petitioner was born in Italy in 1897. In 1917 he was convicted of voluntary homicide in Italy (Exh. A–36, A–37).[1] After his release from prison he was alleged to have killed a second person.[2] Fleeing prosecution in Italy, petitioner came to the United States

[1] The administrative record was lodged with the clerk of the court of appeals and is now on file with the Clerk of this Court. The portion denoted "Certified Administrative Record" is cited herein "A.R.". In addition, the administrative record includes certain exhibits (filed separately), which we shall refer to by exhibit number.

[2] In 1924 he was convicted *in absentia* for this offense, but this conviction later was voided under Italian law by reason of lapse of time (Exh. A–38, A–73).

in 1920. He entered under a false passport, representing himself as Paolo Maglio, under which name he sought and obtained naturalization in 1928.

In 1943 petitioner was convicted of conspiracy to commit extortion in the movie industry and was sentenced to imprisonment for 10 years and fined $10,000 (see Exh. A–64 and A–65 and *United States* v. *Compagna,* 146 F. 2d 524 (C.A. 2), certiorari denied, 324 U.S. 867). After his release from jail in 1947, he remained on parole until 1954 (A.R. 496; Exh. A–94, pp. 2, 10). In 1957 he was indicted for income tax evasion, convicted, and sentenced to imprisonment for three years and fined $15,000. *United States* v. *De Lucia,* 262 F. 2d 610 (C.A. 7), certiorari denied, 359 U.S. 1000.

In 1956, after investigation had revealed petitioner's entry under a false name and his homicide conviction, denaturalization proceedings were instituted. They resulted in the revocation of his citizenship. *United States* v. *De Lucia,* 256 F. 2d 487 (C.A. 7), certiorari denied, 358 U.S. 836. Petitioner was subsequently ordered deported (to Italy) on the grounds that he had entered with fraudulent documents under an assumed name, and that he had been convicted of voluntary homicide prior to such entry (A.R. 287–290). The deportation order was upheld on judicial review. *De Lucia* v. *Flagg,* 297 F. 2d 58 (C.A. 7), certiorari denied, 369 U.S. 837.

The deportation order could not be executed between 1962 and 1964 because of inability to obtain a travel document for petitioner. However, in June 1964 a passport was issued by the Italian Govern-

ment and petitioner was notified to report for deportation on July 4, 1964 (A.R. 279). On July 1, 1964, he unsuccessfully moved to reopen the deportation proceeding (A.R. 278–285). He then brought a habeas corpus proceeding, which the district court dismissed. During the pendency of an appeal from that decision, the parties, with the approval of the court, entered into a stipulation for remand to the administrative authorities solely for the purpose of enabling petitioner to seek any discretionary relief to which he thought himself entitled and to have the special inquiry officer designate the country to which deportation would be effected.

The administrative proceedings were reopened for this purpose (A.R. 263–276). Petitioner applied for two forms of relief. The first was for the so-called "registry" under Section 249 of the Immigration and Nationality Act, 8 U.S.C. 1259, which would have erased his deportability and granted him permanent residence upon his establishing good moral character and worthiness for discretionary relief. The second was for withholding of deportation under Section 243(h) of the Immigration Act, 8 U.S.C. 1253(h), on the ground that he would be subject to persecution if deported to Italy.

Extensive hearings were conducted in which petitioner presented evidence by himself and several witnesses, as well as numerous documents (A.R. 344–726; Exh. A–68 to A–133). However, he produced no witnesses to endorse his reputation or to support his claim of good character. He testified that he had not been engaged in any occupation or employment

for many years, and that his income had been derived almost entirely from an item labeled on his income tax returns as "miscellaneous income", which consisted of winnings from gambling at race tracks (A.R. 420–421, 488; see, also, Exh. A–94). His income from this source was said to be approximately eighty to ninety-two thousand dollars annually (A.R. 450, 454–461).

When pressed on cross-examination concerning his present activities, his sources of income, and his past history, petitioner (without asserting any claims of privilege) refused to answer questions or to produce detailed supporting data, although the special inquiry officer in each instance directed him to answer and to produce such materials. Among the inquiries to which he refused to respond were the following:

1. A current net worth statement (A.R. 680).

2. A listing of his 1964 race track bets, information concededly in his possession (A.R. 651, 680, 710).

3. The 1964 race track programs showing bets and winnings, also concededly in his possession (A.R. 680, 710).

4. The donor of a $500 gift to him (A.R. 468–470).

5. The "friends" who gave money to his wife while he was in jail 1959–1961, and the amount and nature of such payments (A.R. 627, 633, 637).

6. His date and place of birth, parents, criminal record in Italy and the United States, various names he has used, his employments, circumstances of his flight from Italy and fraud-

ulent entry into the United States, and fraud in obtaining naturalization (A.R. 585, 586, 590, 595, 599–621).

7. Whether he had ever engaged in bootlegging or extortion; whether he had been a member of a group engaged in illegal activities; whether he had received any payments from such a group or from such activities (A.R. 621–623).

8. Where he had obtained $102,000 to pay a settlement of his income tax liability in 1962 and $100,000 or $125,000 to settle an earlier income tax liability in 1943 (A.R. 648, 653–654).

9. Whether he had sources of income not revealed on his income tax return for 1964; whether he had additional assets (A.R. 654–656).

After conclusion of the reopened hearings, the special inquiry officer on October 25, 1965, denied the applications for discretionary relief and reinstated the deportation order, directing petitioner's deportation to England, the country designated by him, and alternatively to Italy, if England was unwilling to accept him. The special inquiry officer found that petitioner had not demonstrated his worthiness for the relief of registry in view of his extensive record of criminality and fraud, including a recent conviction for income tax evasion; his refusal to answer questions bearing on his eligibility and worthiness for relief, even though directed to do so; and the false testimony he had given in support of his application.[3] The application to withhold deportation because

[3] A prosecution of petitioner for alleged perjury in these proceedings is pending, with the trial set to begin in February 1967.

of anticipated persecution in Italy was rejected as unsubstantiated.

Petitioner then appealed to the Board of Immigration Appeals, which on April 21, 1966, affirmed the decision of the special inquiry officer and dismissed the appeal (Pet. 31–55). The Board denied the application for registry in the exercise of its discretion (Pet. 45–46). In making this determination the Board took into account petitioner's age, long residence, physical condition, and family ties (Pet. 53), but found these factors outweighed by his extensive record of criminality and fraud, by the absence of any substantial indication of rehabilitation, and by the refusal to answer questions concerning his income and activities (Pet. 54–55).

Following the refusal of England to permit his entry as a deportee, petitioner was again notified to report for deportation to Italy (Pet. 26–28). However, on April 22, 1966, he filed another petition for judicial review of the deportation order (which automatically stayed its execution), contending that the deportation order violated the Eighth Amendment and charging various procedural irregularities (Pet. 22–25). On November 17, 1966, the United States Court of Appeals for the Seventh Circuit affirmed the Board's decision and again upheld the deportation order (Pet. 15–20). The court found the denial of discretionary relief clearly warranted by the record and rejected each of petitioner's claims of procedural irregularity.

ARGUMENT

1. The contention that the deportation order subjects petitioner to cruel and unusual punishment is not open in this proceeding. Petitioner had full opportunity to challenge the deportation order in a previous review proceeding, in which that order was upheld by the court of appeals and certiorari was denied by this Court. The six-month period for review of that order has, of course, long since expired. Section 106 (a)(1) and (c) Immigration and Nationality Act, as amended, 8 U.S.C. 1105a (a)(1) and (c); *Lopez* v. *Immigration and Naturalization Service,* 356 F. 2d 986, (C.A. 3), certiorari denied, 385 U.S. 839. At all events, the constitutional challenge is without merit. While deportation is unquestionably a severe consequence, it has never been regarded as punishment—let alone cruel and unusual punishment—in the constitutional sense. That has been the view taken by this Court in an unbroken line of decisions extending from *Fong Yue Ting* v. *United States,* 149 U.S. 698, 730, to *Mulcahey* v. *Catalanotte,* 353 U.S. 692. The principle was thoroughly reexamined and reaffirmed in *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 594–595, and *Galvan* v. *Press,* 347 U.S. 522, 529–532—decisions that upheld the propriety of deportation proceedings against aliens who—unlike petitioner—entered this country lawfully, thereafter engaging in conduct giving rise to deportability. The present case is thus *a fortiori.*[4]

[4] Petitioner's citation of *Wolf* v. *Boyd,* 287 F. 2d 520 (C.A. 9), ignores the many other decisions in which similar constitutional challenges have been rejected. *Wolf* involved deporta-

We point out that petitioner was 23 years old when he entered the United States illegally, had already served time as a convicted killer, and was fleeing prosecution for a second homicide. Of his years in the United States, eleven have been spent in fighting denaturalization and deportation, and thirteen have been spent in jail or on probation. He professes not

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tion for misconduct in the United States to a country in which the alien had never lived, which of course is not the case here. While the court of appeals found the issue substantial enough to warrant convening a three-judge court, the case thereafter became moot when the deportation order was withdrawn by the administrative authorities. The issue was thus never resolved on the merits. In like circumstances, another court rejected a plea for a three-judge court, finding insubstantial a claim that cruel and unusual punishment was imposed by deportation of a long time resident for misconduct in the United States. *Marcello* v. *Kennedy*, 194 F. Supp. 748 (D.D.C.), vacated and remanded on other grounds, 312 F. 2d 874 (C.A.D.C.), certiorari denied, 373 U.S. 933. Other lower court decisions explicitly rejecting a contention that deportation visits cruel and unusual punishment include *Burr* v. *Immigration and Naturalization Service*, 350 F. 2d 87 (C.A. 9), certiorari denied, 383 U.S. 915; *MacKay* v. *Turner*, 283 F. 2d 728 (C.A. 9), certiorari denied, 364 U.S. 888; *United States ex rel. Circella* v. *Sahli*, 216 F. 2d 33 (C.A. 7), stay denied *sub nom. Niukkanen* v. *Turner*, 348 U.S. 964. Petitioner is mistaken in stating (Pet. 10) that this Court has never specifically considered the application of the Eighth Amendment in deportation cases. *Fong Yue Ting*, *supra*, expressly rejected the claim that deportation is cruel and unusual punishment within the meaning of the Eighth Amendment. And *Carlson* v. *Landon*, 342 U.S. 524, rejected a claim that the bail provision of the Amendment was applicable to deportation cases. The expatriation cases cited by petitioner held only that expatriation for evading military service and for desertion was an improper measure where it had been imposed as punishment for specified criminal conduct. There is no punitive aspect here. Deportation for improper entry is manifestly a proper regulatory measure. See *Wong Wing* v. *United States*, 163 U.S. 228.

to have been gainfully employed for many years. His physical condition is not that of a young man, but he has been examined by a Public Health Service doctor, who found no physical impediment to deportation (see A.R. 578–579). He has lived with some of his asserted ailments for many years, including periods spent in jail. He is obviously a man of means, and there is no reason why he could not obtain any necessary medical treatment in Italy. While he has close family ties in this country, he also has family ties in Italy. In the circumstances, there is, we submit, no basis for the claim that cruel and unusual punishment is being imposed.

2. The parties stipulated for remand of the case in 1964 solely to enable petitioner to present applications for discretionary relief and to have the place of deportation fixed by a special inquiry officer (A.R. 274–275). The burden was upon petitioner to establish his eligibility for relief and his worthiness for the exercise of discretion. 8 C.F.R. 242.17(d); *Kimm* v. *Rosenberg*, 363 U.S. 405. The Board found that, in applying for the discretionary relief of registry, petitioner had testified untruthfully in some respects and had refused to answer many relevant questions concerning his activities and income, and hence—particularly in the light of his long record of criminality and fraud—that he had not proved his case for discretionary relief. Petitioner was also found to have failed to establish his claim that persecution would result if he were deported to Italy. His voluminous depositions and exhibits showed only that if he were to engage in illegal activities in Italy he would be subject to restric-

tive measures imposed by a court (see Pet. 46–50)—hardly the "persecution on account of race, religion or political opinion" with which Section 243(h) of the Act, 8 U.S.C. 1253(h), deals. In this Court, petitioner does not challenge the merits of the denial of discretionary relief, and his precedural contentions are, we submit, without merit.

a. Petitioner was not denied compulsory process, the right of confrontation, or the right to cross-examine (Pet. 13). He is mistaken in contending that, because applications for discretionary relief are considered during the deportation hearing, they are governed by the same procedural requirements applicable to a determination of deportability. This Court expressly recognized in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 230, n. 16, that the consideration of such applications during the deportation hearing is a matter of convenience designed to avoid multiple litigation, and that "denial of suspension of deportation as a discretionary matter is reviewable only for arbitrariness and abuse of discretion, and thus could hardly be within the procedural and evidentiary requisites" (*id.* at 228, n. 15) applicable to the finding of deportability.

(1) The claim to an absolute right of compulsory process in the consideration of such a discretionary application is unwarranted by any statute, regulation or precedent. The court below rightly regarded this as a matter within the discretion of the special inquiry officer (Pet. 18). As the petition itself indicates (Pet. 8), petitioner sought to subpoena various federal, State, and foreign officials. The special in-

quiry officer found that such subpoenas were inappropriate and would result only in harassment and confusion. We point out the considerable assistance afforded petitioner in his efforts to support his applications. He was granted the unusual privilege of taking the deposition of a witness in Italy (Exh. 102). The government also searched unsuccessfully for an alleged petition by deportees in Italy (A.R. 576, 579–80) and offered to produce official records of the Public Health Service (A.R. 579–80). A subpoena for production of information concerning bond purchases was withdrawn upon the government's assurance that it would produce any available information (A.R. 702–704).

(2) The claim of improper denial of confrontation and cross-examination apparently refers (Pet. 9) to petitioner's request to cross-examine officials of the Italian Government concerning an official communication (Exh. A–134) allegedly pertinent to the contention that deportees in his situation would be persecuted in Italy. But it was petitioner himself who had requested the communication (A.R. 580)—which largely confirmed other information already given by petitioner's own witnesses (see Exh. A–102, A–105). The communication had obvious relevance to the consideration of a plea of anticipated persecution and was, therefore, properly received. *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392, 395 (C.A. 2); *Namkung* v. *Boyd*, 226 F. 2d 385, 388 (C.A. 9); *Diminich* v. *Esperdy*, 299 F. 2d 244, 248 (C.A. 2), certiorari denied, 369 U.S. 844.

b. Petitioner's claim of prejudgment is without merit. Similar claims have never been substantiated. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260; *Shaughnessy* v. *United States ex rel. Accardi,* 349 U.S. 280; *Marcello* v. *Bonds,* 349 U.S. 302.[5] Petitioner's evidence of prejudgment consisted primarily of public statements of former Attorneys General announcing a determination to proceed vigorously against a group of unnamed racketeers. Many of these were the very statements found deficient by this Court in the second *Accardi* case and in *Marcello* to show prejudgment. As in second *Accardi,* completely lacking in this record is any showing that the special inquiry officer or the Board was under an express or implied direction to decide the case against petitioner, or that they otherwise prejudged his applications. The record, on the contrary, shows that the Attorney General had issued specific instructions directing officials deciding immigration cases to use their own independent judgment (Exh. A–71). Furthermore, the specal inquiry officer—without contradiction by petitioner at any stage of the administrative or judicial proceedings—stated at the hearing and in his decision that he had received no

[5] In the *Bufalino* case cited by petitioner (Pet. 13) there was a motion for reconsideration followed by a stipulation of the parties remanding the case so that new applications for discretionary relief could be presented and considered. The new applications were denied after extensive hearings and new claims of prejudgment were unsuccessful. The court of appeals has just rejected, on jurisdictional grounds, a challenge to the new administrative order. *Bufalino* v. *Attorney General,* C.A.D.C., No. 20, 161; decided December 6, 1966.

instructions or directions from anyone[6] and had not prejudged the case or considered adverse publicity from any source (A.R. 143–144). Finally, at no time during the proceedings did petitioner claim that the Board of Immigration Appeals itself had prejudged his claim. As this Court noted in its recent decision in *Woodby* v. *Immigration and Naturalization Service*, No. 40, this Term (C.A. 6), Slip op., n. 2, decided December 12, 1966, the Board is not bound by the special inquiry officer's decision, but makes its own independent determination on issues of law and fact and on the exercise of discretion.[7]

3. Petitioner's objections to the execution of the deportation order are also without merit.

a. The assertion (Pet. 11) that the government "deliberately misrepresented" to England that petitioner was a citizen of Italy is unfounded, particularly since he concededly was born in Italy and Italy had issued a passport for him. Ultimately, of course, Italy will decide whether he is a citizen of that country, if and when the execution of the deportation order again becomes imminent and an application to reinstate the passport is made.

b. We agree that acceptance of a deportee by the country of destination is a prerequisite to deportation but

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[6] We point out that the public statements to which petitioner refers were made by Attorneys General and a Commissioner who have long been out of office. No such prejudicial statements were, or could be, attributed to Attorney General Katzenbach or Commissioner Farrell, who were in office throughout these administrative proceedings.

[7] Nor was petitioner precluded from raising the issue of prejudgment with the Board. In both *Accardi* and *Marcello* Board prejudgment was unsuccessfully urged to the courts. Equally, petitioner here could have made such a challenge before the Board itself.

not that such acceptance must be procured before deportation to that country is reasonably definite and imminent. There would be no point in soliciting such an acceptance so soon—the deportation order might not become final for several years and deportation might be nullified by administrative or judicial review, by the grant of discretionary relief, by the enactment of new legislation, or by the deportee's acceptance in a country designated by him. Therefore, under current practice, the special inquiry officer in his order designates the alternative places of deportation only provisionally. 8 C.F.R. 242.17(c), 242.18(c). The inquiries to the countries designated by the alien or specified alternatively by the special inquiry officer are ordinarily not made until the deportation order is final. See Gordon and Rosenfield, *Immigration Law and Procedure* (1966 Rev.), §§ 5.17, 5.18.

In the present case there was an acceptance by Italy, in the form of a passport that had been issued in 1964 and was valid and outstanding at the time this proceeding for judicial review was brought. The bringing of the review proceedings in effect suspended the finality of the deportation order, and Italy suspended the validity of the passport (Pet. 9). If and when the deportation order once more becomes final, the government will again inquire, as the law requires, whether Italy will agree to accept petitioner as a deportee. Under current regulations, if the answer is affirmative, petitioner will be informed of such acceptance and will receive at least 72 hours' notice to report for deportation. 8 C.F.R. 243.3.

c. Petitioner's claim that his plea for a stay of deportation for medical reasons was not adequately considered is unsupported by the facts. He made a similar plea in 1964, which was denied after he was examined by a United States Public Health Service doctor (A.R. 285, 578–79); the testimony of his own physician cannot thus be accurately characterized as "without contradiction" (Pet. 2). His 1966 application for a stay on the same grounds and on similar allegations (Pet. 29)—unaccompanied by any new evidence—presented no basis for favorable action. The submission of alleged supporting medical data a month after the application was denied and after this litigation was well under way (Pet. 14) likewise furnishes no basis, we submit, for upsetting the denial of the application for a stay.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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